No. 93-7927

In The
Supreme Court of the United States
October Term, 1994

CURTIS LEE KYLES,

Petitioner,

versus

JOHN WHITLEY, Warden,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

I. Course of Proceedings

Respondent (hereafter, "the State") accepts petitioner's statement of the course of proceedings.

II. Statement of Facts

On Thursday, September 20, 1984, at approximately 2:20 p.m. Delores Dye ("Mrs. Dye") exited the Schwegmann Bros. grocery store ("Schwegmann's") at 5300 Old Gentilly Road in New Orleans and proceeded to her car which was parked in a Schwegmann's lot across the street. Mrs. Dye had parked towards the end of an aisle of cars. Upon reaching her car, Mrs. Dye loaded her bags of groceries into the trunk of her red 1977 Ford LTD. At this point Mrs. Dye was met by a man who attempted to rob her. When Mrs. Dye would not give up the keys to her car, a struggle ensued. Mrs. Dye momentarily broke away and ran to the passenger side of the car but the perpetrator caught up. She screamed as the perpetrator grabbed her left hand. Not wanting to deal with a difficult victim, the perpetrator produced a .32 caliber revolver and shot Mrs. Dye in the left temple at point blank range. Instantly, Mrs. Dye was dead leaving behind a husband, son and grandson.

The perpetrator then calmly bent over, picked up the car keys from Mrs. Dye's hand, got into her car, and drove out of Schwegmann's parking lot onto Chef Menteur Highway. The perpetrator made a right and then another right turn onto France Road.

A. The Police Investigation

Detective John Dillman ("Det. Dillman") of the New Orleans Police Department's Homicide Unit was the chief investigating officer assigned to Mrs. Dye's murder. He arrived on the scene within minutes and immediately found the following five eyewitnesses who gave statements on the scene and later signed typewritten statements at the police homicide office.

1. Henry Williams, a 50 year old Norco employee, was standing at a barricade in Schwegmann's parking lot.

2. Isaac Smallwood, a 34 year old Norco employee, was working standing at the old gas pumps in Schwegmann's parking lot.

3. Edward Williams, a 16 year old high school student, was waiting for a bus on Chef Menteur Highway in front of Schwegmann's.

4. Willie Jones, a 45 year old Norco employee, was working in the Schwegmann's lot.

5. Lionel Plick, a 62 year old man, was waiting for a bus on Chef Menteur Highway in front of Schwegmann's.

Later that day when Det. Dillman returned to the homicide office he discovered the existence of the following two additional eyewitnesses who had left the crime scene and later called the police to report the murder.

1. Robert Territo, 19 years old, was in his company truck waiting for a red light on Chef Menteur Highway.

2. Darlene Cahill (now "Darlene Cahill Kersh") witnessed the altercation from approximately 100 ft. away while riding in a vehicle on Chef Menteur Highway.

Every witness described the perpetrator as a young black man with his hair in braids or plaits.

The police were substantially without leads until Saturday evening September 22, 1984, when a man identifying himself as James Joseph[1] ("Beanie") contacted police to report that he was in possession of a red Ford Thunderbird which he believed might belong to Mrs. Dye. Beanie stated that he had purchased the car from his friend, Curtis (later identified to be Curtis Kyles), and discovered that it may be Mrs. Dye's car when he read about the murder in the paper.[2]

Detective John Miller and Sergeant James Eaton met with Beanie that evening at approximately 10:00 p.m. at a pre-arranged location. Det. Miller wore a microphone for his own protection. During this meeting Beanie told Det. Miller and Sgt. Eaton that he purchased Mrs. Dye's automobile from Kyles on Friday, September 21, 1984. Beanie repeated to them that he concluded the car may belong to

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[1] James Joseph had several aliases. He was also known as Joseph Banks, Beanie Banks, and Joseph Brown. His real name is Joseph Wallace. Throughout this brief, Joseph Wallace will be referred to as "Beanie."

[2] The NOPD supplemental police report indicates that Beanie stated in his telephone call that he purchased the car from Kyles on Thursday, September 20, 1984. During his subsequent taped conversation with Detective John Miller on Saturday, September 22, 1984, however, Beanie stated that he purchased the car from Kyles on Friday, September 21, 1984.

Mrs. Dye after reading about the murder in the newspaper. Beanie led Det. Miller and Sgt. Eaton to Mrs. Dye's Ford LTD which police then seized and took to the NOPD Crime Lab Cage for analysis. Beanie then accompanied Det. Miller and Sgt. Eaton to Schwegmann's and to Kyles' residence at 2313 Desire Street. At approximately 12:30 a.m. on Sunday, September 23, 1984, Det. Miller conducted an extensive interview with Beanie at police headquarters, which culminated in a signed statement. During this interview, Beanie repeated substantially what he had earlier told Eaton and Miller.[3]

As a result of the leads supplied by Beanie, Det. Dillman ordered police officers Lambert and Saladino to retrieve garbage from the curb in front of Kyles's residence at 2313 Desire Street. The officers seized five bags of garbage from that location at approximately 1:00 a.m. on Monday, September 24. The garbage bags were immediately locked in the Crime Lab Cage for analysis.

On Sunday, September 23, 1984, Det. Dillman obtained an arrest warrant for Kyles and a search warrant for the residence at 2313 Desire Street. These were executed on Monday morning, September 24th.

Kyles was apprehended without incident. Several incriminatory items of evidence, including the murder

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[3] J.A. 214-215. In his written statement Beanie indicates that his brother-in-law, Ronald Craig, told him that the car was stolen based upon his brother-in-law's viewing of television and newspaper reports. Previously, Beanie told Det. Miller and Sgt. Eaton that he himself learned of the possibility from the newspaper.

weapon, were seized from Kyles's residence at 2313 Desire Street.[4]

Later that day (September 24), Det. Dillman conducted photographic line-ups with six photographs, including Kyles's photograph. Det. Dillman showed the photo line-up separately to Smallwood, Jones, Henry Williams, and Territo. Smallwood, Territo and Henry Williams positively identified Kyles's photograph as that of the murderer. Jones was only able to make a tentative identification of Kyles.[5] Cahill was not shown a photo

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[4] The evidence seized included:

1. Eight Schwegmann's grocery bags from a kitchen cabinet.
2. One .32 caliber revolver containing five live rounds and one spent round located behind the kitchen stove. This was later determined to be the murder weapon.
3. One homemade holster from a cedar chest in the bedroom.
4. One brown case with forty-five live cartridges of various calibers from a dresser drawer in the bedroom.
5. One box of .32 caliber ammunition from a dresser drawer in the bedroom.
6. One .22 caliber rifle from under a mattress in the bedroom.
7. Fourteen .22 caliber cartridges from under a mattress in the bedroom.
8. Schwegmann's bag filled with a large amount of cat and dog food from the kitchen.

[5] Jones did not testify at trial. After trial the defense contacted some of the witnesses and showed them a defense version of a photo line-up in which photos of Kyles and Beanie appeared and in which the hair of Kyles had been superimposed on the head of Beanie. Jones nevertheless picked out the photo

lineup but made an in-court identification on November 26, 1984, during Kyles's first trial, and again at his second trial on December 8, 1984.

B. The Trial

Prosecutors Cliff Strider and Jim Williams represented the State in both the first and second trials. Martin Regan was defense counsel for both trials.

A pathologist opened the trial with testimony about Mrs. Dye's wound and cause of death. The State followed with Territo, Cahill, Smallwood, and Henry Williams, who testified regarding the shooting. Det. Dillman, the chief investigating officer, testified regarding the police investigation, followed by crime scene and laboratory technicians. The State's case ended with Robert Dye, Mrs. Dye's husband, who established that Mrs. Dye often purchased the same brands of cat and dog food that were found in Kyles's residence.

The defense argued at trial that Beanie was the perpetrator instead of Kyles. In support of this assertion defense witnesses, who were friends and relatives of Kyles, testified that Beanie was seen driving Mrs. Dye's automobile on Thursday, September 20; that Beanie changed the license plate on the vehicle, and offered to sell the vehicle on Friday, September 21; and that Beanie was seen looking behind Kyles's kitchen stove on Sunday, September 23.

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of Kyles as the murderer and rejected the photo of Beanie. H. 4-7-89, p. 5.

The State recalled Territo, Cahill, Smallwood and Henry Williams during rebuttal. For each witness, the State brought in Beanie to stand next to Kyles in front of the jury. Without hesitation each witness professed their conviction that Kyles, not Beanie, murdered Mrs. Dye.

The jury returned a verdict of guilty of first degree murder.

C. The Sentencing Phase of the Trial

The State re-introduced its case presented during the guilt phase of trial and presented no other evidence. Kyles's sisters and brothers testified on his behalf. Kyles took the stand as well. The jury recommended the death sentence, which was imposed by the court.

SUMMARY OF THE ARGUMENT

Petitioner Kyles claims he was deprived of fundamental fairness at his trial in both the guilt and sentencing phases because prosecutors and police withheld exculpatory evidence and presented "false" evidence against him.

The State did not withhold exculpatory evidence and did not present false evidence.

The State presented four eyewitnesses at trial who identified Kyles as the perpetrator of a vicious murder committed during an armed robbery at a grocery store. Three of these witnesses saw Kyles shoot the victim, and the fourth saw Kyles leave the area. These witnesses are solid in their identifications of Kyles, and were the heart

of the State's case at trial. Kyles complains that written statements taken from most of these witnesses were inconsistent with testimony given by the witnesses in court, and that he was not provided with the statements before trial. The fact is that these statements contained a few inconsistencies, but the inconsistencies which were present were inconsequential.

Kyles claims he was framed by the real murderer, named "Beanie," who informed on him to police. When police and a prosecutor talked to Beanie they documented their conversations with him. Kyles now claims that some of the information Beanie gave the State was exculpatory. The information Beanie gave police was not always consistent, but that information did inculpate Kyles and did not exculpate him.

Beanie did not testify at Kyles's trial and the State did not present a theory of the case to the jury which was dependent on Beanie's credibility. Police and prosecutors did not consider Beanie to be a suspect in the murder. It did not occur to them to turn over documentation of their relations with Beanie. Kyles likely would have used some of the police information if he had it but the information was not material exculpatory evidence because there is no reasonable probability that, had the information been turned over to the defense, the result of the trial would have been different. The failure to turn over this material does not undermine confidence in the outcome of the trial.

Kyles's *Brady* claims are properly evaluated under *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), since the issue he presents is the

materiality of the allegedly exculpatory or favorable evidence. His claims of police and prosecutor misconduct largely involve issues of withheld evidence and thus can be analyzed in terms of *Bagley*.

Kyles's claim that prosecutors and police withheld material exculpatory evidence fails because he has not demonstrated that the withheld information was material as that term was defined in *Bagley*. Whether considered separately or collectively, the withheld matter does not give rise to "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley, supra*, at 105 S.Ct. 3385 (opinion of Blackmun, J.).

The facts of this case validate Justice Blackmun's conclusion in *Bagley* that "[A] rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." *Id.*, at 105 S.Ct. 3380 n. 7.

ARGUMENT

I.

THE STATE PRESENTED CONVINCING EVIDENCE OF PETITIONER'S GUILT AT THE TRIAL.

The four eyewitnesses who testified at Kyles's December 8-10, 1984, trial each observed Kyles drive off the Schwegmann's parking lot after Mrs. Dye was shot. Three of the four actually witnessed Kyles shoot Mrs.

Dye. Their attention had been riveted on Kyles as, in the bright afternoon sunlight, Mrs. Dye screamed. They then observed Kyles shoot her, get into her automobile, and drive away. Each positively identified Kyles at trial. In addition, the State presented substantial physical evidence taken from Mrs. Dye's car and from Kyles's residence.

A. FOUR EYEWITNESSES POSITIVELY IDENTIFIED KYLES AS MRS. DYE'S MURDERER.

At a pretrial hearing on Kyles's motion to suppress identification, Det. Dillman testified that eyewitnesses Smallwood, Williams, and Territo instantaneously identified Kyles as the murderer upon looking at the lineup photographs. R. vol. 2, p. 8. Kyles's trial attorney, Martin Regan, cross-examined these witnesses extensively during that hearing, and thus was fully aware before trial of what these witnesses claimed to have seen.[6]

The state called four eyewitnesses during the guilt phase of the trial who identified Kyles in court as the murderer of Delores Dye[7]:

1. *ROBERT JOSEPH TERRITO*, was delivering equipment in his company's truck and was stopped in traffic when he heard Mrs. Dye scream. He was only

[6] His cross-examination of Mr. Smallwood covered over six pages of transcript (R vol. 2, pps. 14-20); his cross-examination of Mr. Williams covered almost four pages (R vol. 2, pps. 24-27); and his cross-examination of Mr. Territo covered four transcribed pages (R. vol. 2, pps. 32-35).

[7] R. vol 2, trial transcript, Dec. 6, 1984, pps. 11-62.

thirty to forty yards from Mrs. Dye and saw everything that happened after the scream. After the perpetrator drove Mrs. Dye's car off the Schwegmann's lot he pulled up next to Territo, who watched him constantly:

> "I got a good look at him. If I had been in the passenger seat of the little truck, I could have reached out and not even stretched my arm out, I could have grabbed hold of him." R. vol. 2, trial transcript, Dec. 6, 1984, p. 13, 14.

2. *DARLENE CAHILL* was a passenger in an automobile when she witnessed the struggle between Mrs. Dye and the perpetrator. She was within 100 feet of the shooting. She and her companion tried to follow the perpetrator in traffic, saw him from the side about a car length away, and got a good look at him (R. vol. 2, p. 32). Her automobile drove to the side of the perpetrator's car: "We could have hit the driver's door if we wanted to," she testified. *Id.*, p. 34.

3. *ISAAC SMALLWOOD*, a Norco Construction Company employee, was working on a gas pump on the Schwegmann's lot when the murder occurred. He told Det. Dillman that his attention was attracted by the shot, and so testified at Kyles' first trial.[8] He testified at the second trial that he saw the entire incident from a distance of seventy-five to eighty feet. *Id.*, p. 43. Smallwood testified that when Kyles drove off the parking lot he drove within about twenty-five feet of Smallwood (*Id.*, p. 43), and when Kyles drove by on the highway he was about fifteen feet from Smallwood. *Id.*, p. 45. Smallwood

[8] Trial transcript, Nov. 26, 1984, testimony of Isaac Smallwood, p. 51.

identified Kyles as the perpetrator and said he got a good look at him. *Id.*, p. 43.

4. *HENRY WILLIAMS*, also an employee of Norco Construction Company working on the parking lot, testified that he witnessed the entire event, and that after shooting Mrs. Dye, the perpetrator passed within ten feet of him. *Id.*, p. 55.

After the defense presented its case and revealed its contention that Beanie Wallace was the murderer, the State recalled each of its four eyewitnesses on rebuttal. The State brought Beanie into the courtroom separately for each witness and had him stand next to Kyles, so each witness could compare the two men. Their reactions:

1. Territo chose Kyles over Beanie as the perpetrator (R. vol. 3, trial transcript, Dec. 7, 1984, p. 374), and testified after seeing them together that there was "No doubt in my mind" that Kyles killed Mrs. Dye. R. vol. 3, trial transcript, Dec. 7, 1984, p. 378.

2. Cahill testified after comparing the two that "I'm positive it wasn't the other man" (Beanie) *Id.*, p. 381, and testified she had never seen Beanie before. Speaking of Kyles, she again confirmed her identification, stating:

   "I know it was him. I seen him. I seen his face and I know the color of his skin. I know it. I know it's him." *Id.*, p. 383.[9]

[9] Kyles has filed a motion in state court for a new trial, alleging that Darlene Cahill (now Darlene Kersh) has retracted the testimony she gave at his trial and now claims she could not identify the perpetrator. That motion has not been heard on the merits in any court. The allegation was first made while Kyles's present claim was on appeal in the Fifth Circuit, but was dismissed as untimely filed. See Order of Judge Arceneaux, J.A. 184-7. The Court of Appeals instructed the district court to deny relief on the ground that a petitioner may not use a Rule 60(b) motion to raise constitutional claims that were not included in the original habeas petition. J.A. 43. The Louisiana Supreme Court has stayed action on the motion pending disposition of the present claim in this Court.

3. Smallwood reconfirmed his choice of Kyles. "I'm positive," he testified. *Id.*, p. 387.

4. Henry Williams, when confronted with Beanie, testified that he was "positive" he did not see Beanie in the parking lot. He had "No doubt in my mind." *Id.*, p. 391.

The state trial judge, who presided over both trials and the state post-conviction hearing, pointed out in his judgment on the post-conviction application that Kyles and Beanie "clearly and distinctly did *not resemble*" each other. J.A. 36 (emphasis in the original). Their distinct differences in physical appearance – Kyles was taller, darker, and thinner than Beanie – is evident from examining the photographs of the two men which were introduced into evidence.[10]

[10] The Fifth Circuit majority opinion stated that: "Comparing photographs of Kyles and Beanie, it is evident that the former is taller, thinner, and has a narrower face. More importantly, the eyewitnesses and the jury were allowed to compare Beanie and Kyles. After doing so, Smallwood stated, 'they don't look nothing alike to me.' Each eyewitness repeated their conviction that Kyles was the gunman they saw at Schwegmann's." J.A. 55.

1. KYLES' POST-CONVICTION ATTACK ON THE EYEWITNESS TESTIMONY IS WITHOUT MERIT.

Kyles, faced with the direct testimony of Territo, Cahill, Smallwood, and Henry Williams, now claims that he was denied the benefit of the use of the written statements taken from three of these witnesses (Territo, Smallwood, and Williams), as well as written statements taken from three other witnesses who did not testify at trial (Willie Jones, Lionel Plick, and Edward Williams). Kyles claims these statements would have aided him in impeaching the witnesses' testimony.[11]

Under Louisiana law the State has no obligation to turn over written statements of its witnesses which are not exculpatory. The State submits that an examination of these written statements shows that they are not exculpatory evidence as defined by this Court. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

a. Discrepancies in Height, Weight, and Age

In his brief, Kyles provided a chart which lists the physical characteristics of the perpetrator as described in the written statements of the eyewitnesses (brief, appendix "C"). These descriptions present a consistent picture of a perpetrator who was a young Afro-American, of slight build, with braided or platted hair. This description is consistent with Kyles's physical appearance. Kyles cites

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[11] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The statements are found at J.A. 188-213.

slight differences in the witnesses' estimates of the perpetrator's age, height, and weight, as discrepancies and argues that these discrepancies constitute material exculpatory evidence.

Neither the State nor the defense asked any of the eyewitnesses who provided written statements to describe the perpetrator's height, weight, or age, at the trial or in any pretrial hearing.[12] Thus, the estimates of these characteristics as expressed in the written statements given to the police did not contradict testimony given by these witnesses and could not have been used to impeach their testimony.

Det. Dillman testified at pretrial that "[p]ossibly the only discrepancy [in the written statements] would have been in height."[13] Dillman then proceeded to describe discrepancies in height (5'8" to 6' tall), and age ("twenty to twenty-eight, possibly"), with no other discrepancies.[14] As petitioner's diagram in appendix "C" reflects, Dillman's statement was not entirely correct, since the estimated height differences in the six written statements range from five feet, four inches to close to six feet, and the estimated age differences range from seventeen to

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[12] The State did ask Darlene Cahill at Kyles' first trial to give a general description of the perpetrator, to which she replied, "[a]pproximately five-six, five-five . . . ". Trial transcript, Nov. 26, 1984, p. 27. However, Ms. Cahill did not provide a written statement to police, nor was similar testimony elicited in any later proceeding from her. Thus, her testimony is not subject to Kyles's impeachment argument.

[13] Hearing, November 6, 1984, testimony of Det. John Dillman, p. 7.

[14] *Id.*, pps. 7-8.

twenty-eight years. Also, Smallwood's written statement claims the perpetrator had a light mustache and his braids went to his shoulders.[15] However, there is no reason to believe that Dillman's testimony did not represent his good faith recollection at the time, and he was not far off the mark. The discrepancies in the written statements of the eyewitnesses are within an expected range. The age, height, and weight discrepancies in the written statements do not contradict the testimony of the eyewitnesses in court and do not suggest that Beanie may have been the perpetrator. It must be recognized that had Dillman's estimates been more accurate Kyles might have inquired into these discrepancies at trial, slight as they were. These written statements would have been of very limited value, if any, to Kyles. The State submits that existence of the minor discrepancies in these statements is exactly what the Court had in mind when it held in *Bagley* that exculpatory evidence must not only be favorable, but also material, before the state must provide it to the defense.[16] The statements did not constitute material exculpatory evidence.

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[15] J.A. 189. Smallwood's written statement also contains a claim that he did not see the incident before the shot was fired. This is treated in the next part of this argument.

[16] *United States v. Bagley*, 105 S.Ct. 3375, 3380 n. 7 (plurality opinion): " . . . [A] rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments."

b. Isaac Smallwood's Testimony

Shortly after the murder Isaac Smallwood gave the police a written statement in which he stated that he was standing near the gas pumps on the Schwegmann parking lot when he heard a loud pop. "When I looked around I saw a lady laying on the ground, and there was a red car coming toward me." J.A. 188-190. He stated that he did not see a weapon, that the car passed near him, and he thought he could identify the person driving the car.

Smallwood's testimony at Kyles's first trial was consistent with his written statement to police shortly after the murder. Smallwood testified during the first trial that he heard the shot and when he looked in the direction from which the shot came the lady was already on the ground.[17]

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[17] At Kyles' first trial, on November 26, 1984, the prosecutor asked Mr. Smallwood what he saw, to which Smallwood responded:

> A. Yes, me and my co-workers, we were standing by until my foreman come back from Schwegmann's from using the telephone, and see I had my back turned to the Chef [highway], and that's when *I heard something went off*; that's when my podnah, Henry [Williams], he said "a woman over there got shot," *so I looked over there towards the lady laying on the ground*, and the guy got up into this woman's car and passed me by in the lot.
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> - - - - -
>
> Q. *When you looked over there*, what was that individual doing? The lady – *was the lady already on the ground?*
>
> A. *Yes.*
>
> Q. And what was the individual who drove the car, what was he doing?

At the second trial, however, Smallwood testified that he saw the whole incident, including the shooting itself. Nevertheless, Regan, defense counsel at both the first and second trial, was present and heard Smallwood's testimony. Therefore, Regan was, or should have been, aware of Smallwood's testimony regarding the sequence of events. Apparently Regan did not conclude that the discrepancy was worth examining on cross-examination, or perhaps did not even notice the discrepancy because it pertained to a fact which was not questioned at the trial – that the same man who drove Mrs. Dye's car off the parking lot had also shot her.

Kyles now claims that the state should have provided Smallwood's written statement, because that statement partially contradicts his testimony at the second trial. Kyles fails to point out that Smallwood's testimony at the first trial also contradicts his testimony at the second trial, and Regan was present at both to recognize the discrepancy himself. Thus, Smallwood's written statement would not point out any discrepancy which should not have already been apparent on the face of Smallwood's trial testimony. Neither Kyles's defense counsel nor the prosecutors paid attention to the difference in

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A. He just got in the car like it was his own car, and eased over, I guess going on about his own business. Tr. Trans., State v. Curtis Kyles, Criminal District Court, No. 304-163, testimony of Isaac Smallwood at trial on the merits, 11-26-84, p. 50, 51.

At the hearing on Kyles's postconviction application for habeas corpus relief, during the testimony given by his trial attorney, Martin Regan, the judge took judicial notice of the testimony at the first and second trials. Hearing, 2-20-89, testimony of Martin Regan, p. 5.

testimony between the first trial, which was consistent with the statement, and the testimony at the second trial. The difference was inconsequential.

The Fifth Circuit majority, treating this discrepancy, stated:

> Kyles overlooks, however, that Smallwood consistently stated that the gunman then drove the LTD close by him. Smallwood always maintained that he got a good look at the killer then, and like Williams, immediately recognized Kyles in the photographic lineup. Smallwood never made a statement calling his ability to recognize the gunman into question, and we are not persuaded that use of this material by the defense would have undermined the force of his identification, particularly in light of its corroboration by others.
>
> J.A. 55

B. ALL PHYSICAL EVIDENCE PRODUCED BY THE STATE AT THE TRIAL IMPLICATED KYLES AS MRS. DYE'S MURDERER.

Additional supporting evidence offered by the state during the guilt phase of the trial included: (1) a Schwegmann's sales slip found in Mrs. Dye's automobile which contained two of Kyles's fingerprints; (2) the murder weapon (.32 cal. pistol) found in Kyles' residence behind a kitchen stove; (3) Mrs. Dye's purse, personal papers, and credit cards, found in a trash bag outside Kyles' residence; and (4) Schwegmann's shopping bags seized from Kyles' kitchen, along with cans of the same brands of pet food often purchased by Mrs. Dye.

II.

KYLES HAD CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL.

Kyles initially claimed that his trial counsel, Martin Regan, was ineffective within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). He did not pursue this argument in his brief to this Court, although effective performance of trial counsel is one of the issues approved by the Court for review. The Court of Appeals considered only the claim that counsel was ineffective because he did not interview Beanie and call him to the witness stand at trial as a defense witness. This limited claim is treated here because the dissent in the Court of Appeals decision addressed the issue at some length. J.A. 93-97, 108-109.

Martin Regan represented Kyles at trial. Regan is a respected New Orleans attorney who, at the time of Kyles's trial, had tried over one hundred jury trials and participated in at least three capital trials. H 2-20-89, p. 2. Judge Waldron, who presided over the trial and the state postconviction hearing, concluded that "Mr. Regan provided the defendant with a vigorous, dedicated and more than adequate defense."[18]

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[18] Judgment, J.A. 31. Judge Waldron continued, "As he always has been, in the many cases he has tried before this Court, Mr. Regan was a tenacious advocate on behalf of his client. His reputation as an attorney who is always prepared for, familiar with his case, and professional in his presentation remains intact despite the outcome of this particular case." J.A. 31-32.

Regan testified at the postconviction hearing that he did not call Beanie as a witness at the trial because he erroneously thought that under Louisiana law Beanie must be hostile and his testimony must be surprising before Beanie could be cross-examined. The State submits that Regan's decision, even if based upon an erroneous understanding of the law, was proper and Kyles suffered no prejudice from the decision.

If Regan had called Beanie as a witness the likelihood is that Beanie would have refused to testify and invoked a "blanket" Fifth Amendment privilege.[19] Under Louisiana procedure the determination as to Beanie's right to assert his Fifth Amendment privilege would have been made outside the jury's presence and the invocation by Beanie would not, as the dissent suggests, "have presented Kyles with valuable ammunition supporting the theory of the defense." J.A. 108. *State v. Berry*, 324 So.2d 822, 829-830 (La. 1975). Indeed, in Louisiana it is improper conduct for either the prosecution or the defense knowingly to call a witness who will claim a privilege, for the purpose of impressing upon the jury the

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[19] As Judge King pointed out in her dissent, "[t]he entire purpose of calling Wallace [Beanie] would have been to expose his leading role in the development of the prosecution's case, to impeach him and, in the process, to accuse him of framing Kyles and suggest that Wallace had some role in the murder." J.A. 97. However, Judge King was incorrect in concluding that there was a "serious question" as to whether Beanie could have taken a "blanket" Fifth Amendment privilege as to all questions asked. Under Louisiana law Beanie had the right to assert such a blanket privilege, since the evidence introduced by the defense implied that he was the perpetrator. *State v. Savoy*, 537 So.2d 246, 249-250 (La. App. 4 Cir. 1988).

fact of the claim of privilege. *State v. Berry, supra,* at. 830.[20] Once the defense called Beanie the trial court, which was aware of the defense tactic involved, surely would have advised Beanie of his rights and assigned counsel to advise him, as the court did with two other witnesses who appeared on behalf of Kyles.[21]

In the unlikely event that Beanie was called to the stand and did not invoke his Fifth Amendment privilege, he would have surely testified that, as he told police, he purchased Mrs. Dye's car from Kyles, he helped Kyles remove Mrs. Dye's groceries from her car, he took Kyles to Schwegmann's to retrieve his own car, and he knew Kyles carried a .32 cal. pistol. This evidence was not presented by the State, although some of it was brought out on cross-examination of other witnesses by the defense.

To Kyles, Beanie was at best a "loose cannon," as the Court of Appeals majority noted. J.A. 70. Regan could have cross-examined, but his cross-examination would,

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[20] The Louisiana Supreme Court cites as authority for its conclusion the American Bar Association Standards of Criminal Justice, Relating to the Prosecution Function, Standard 5.7(c), and Relating to the Defense Function, Standard 7.6(c) (1971). *Id.*, p. 830.

[21] The trial court appointed an attorney to advise defense witnesses Kevin Black and Johnny Burnes regarding their right to assert their Fifth Amendment privilege, once it became apparent that they may have been accessories after the fact to the murder. R. vol. 2, pps. 194-202. This was done outside the presence of the jury and the procedure was approved in this case by the Louisiana Supreme Court. *State v. Kyles*, 513 So.2d 265, 271-272 (La. 1987), J.A. 12-14.

under Louisiana law at the time, have been limited to impeachment, and, even then, "the impeachment must be limited to evidence of prior contradictory statements." La. R.S. 15:487; see J.A. 32. Contrary to the argument of the dissent below, the limitation of Beanie's cross-examination to impeachment would have prevented or at least drastically limited exploration by Kyles of his claim that Beanie was the murderer. It would also have prevented exploration of other aspects of Beanie's life, such as his prior arrests or possible involvement in crimes other than the murder of Mrs. Dye.

Martin Regan made the correct decision when he decided not to call Beanie as a witness at trial.[22]

III. THE STATE DID NOT FAIL TO DISCLOSE FAVORABLE MATERIAL EVIDENCE, AND DID NOT PRESENT FALSE EVIDENCE AT TRIAL.

The State emphatically denies Kyles's claim that the prosecutors and the police in Kyles's case suppressed information which was favorable and material to Kyles's defense, and used "false" evidence at his trial. The record simply does not support Kyles's charges. An examination of these claims shows that the police and prosecutors acted in good faith in preparing and presenting an overwhelming case against Kyles, and the items possessed by the police about which Kyles now complains did not constitute material exculpatory evidence.

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[22] The Court of Appeals majority treats *Strickland* at J.A. 69-73.

While Kyles has made many claims, they are all without substance. As the federal district court commented while considering Kyles's claims below, "Twenty times zero is still zero." J.A. 180.

A. THE STATE WAS NOT BOUND TO SUPPLY EVIDENCE OF BEANIE'S CHARACTER OR CREDIBILITY.

The Court of Appeals majority noted the fact that the State neither called Beanie as a witness nor informed the jury of the contents of his initial tip to police.[23] As that majority stated, "[p]rosecution witnesses did not mention Beanie by name except in response to the cross-examination by [defense attorney Martin] Regan." J.A. 69. Thus, the State did not recommend Beanie's character or credibility to the jury, and, because neither party called Beanie as a witness, his character and credibility were not issues at the trial. The State did not even claim that Beanie was an innocent purchaser of Mrs. Dye's vehicle,[24] and did not propose a theory of the case to the jury in which Beanie played a part. Beanie "made our case," as prosecutor Strider testified, by providing Kyles's name to police, thus enabling them to conduct photographic lineups with the witnesses which included Kyles's picture.[25]

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[23] Opinion of the Fifth Circuit Court of Appeals, at J.A. 58.

[24] The Fifth Circuit majority noted that the " . . . state never urged and no prosecution witness ever stated that Beanie was an innocent buyer." J.A. 58.

[25] H 2-20-89, testimony of Cliff Strider, p. 116-117. United States District Court Judge Arceneaux stated: "Beanie's testimony and good character were not an issue. Beanie supplied a name. That is virtually all he did." J.A. 169.

However, the State was not obligated to provide evidence of his character, his credibility, or his lack of credibility.

B. THE STATE DID NOT SUPPRESS ANY FAVORABLE MATERIAL EVIDENCE WHICH SHOWED EITHER THAT BEANIE FRAMED KYLES OR MURDERED MRS. DYE.

Kyles claims that the record contains a strong inference that Beanie had a deal with the State for favorable treatment in exchange for information,[26] and implies that the State covered up Beanie's acts in framing Kyles. The record does not support this allegation.

Kyles was convicted of first degree murder less than three months after his arrest. During this brief period the prosecutors, Cliff Strider and Jim Williams, prepared their case for trial by interviewing the homicide detectives assigned to the case, particularly the case officer, Det. Dillman, and homicide Det. John Miller. The prosecutors also interviewed the witnesses to the shooting and had access to some of the police "dailies." They did not receive the police homicide report until after Kyles was tried and convicted.[27]

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[26] Petitioner's brief, p. 35.

[27] The homicide report in this case was forwarded to the District Attorney's office on December 10, 1984, two days after the trial had been completed. Testimony of Cliff Strider, H 2-20-89, p. 102-103, 107-108; testimony of Det. Robert Kessel, H 3-3-89, p. 25.

The police never considered Beanie a suspect in the Dye murder.[28] After the first trial, when Kyles introduced his defense that Beanie had perpetrated the murder, prosecutor Cliff Strider interviewed Beanie for the first time and satisfied himself that Beanie was not the murderer.[29] Beanie was clearly an unsavory character, an informant whom Det. Miller believed to be "a con-man, drug user at times, [and] thief,"[30] a man who was well acquainted with Kyles and his friends,[31] but who was not Mrs. Dye's murderer.

Since the police and prosecutors did not consider Beanie to be the murderer, they did not view their relations with him or his activities to be favorable material evidence which Kyles could use in his own defense. Kyles's complaints regarding evidence the police possessed about Beanie are as follows:

1. The Tape of Beanie's Meeting with Det. Miller on Saturday, September 22, 1984.

The Saturday evening meeting between Det. John Miller and Beanie was their first time to meet in person.[32] Sgt. Eaton placed a microphone on Det. Miller before Miller went to the meeting because he was not sure what

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[28] H 2-24-89, testimony of Det. John Miller, p. 22; testimony of Det. John Dillman, H 2-24-89, p. 71.

[29] H 2-20-89, p. 141.

[30] H 2-24-89, testimony of Det. John Miller, p. 22.

[31] *Id.*, p. 24.

[32] H 2-24-89, p. 2, testimony of Det. Miller.

Beanie had in mind and wanted to protect Miller.[33] The tape was not brought to the district attorney's office until after the trial and was not seen by prosecutors before trial.[34] Det. Dillman did not listen to the tape because police had obtained Beanie's written statement.[35]

Petitioner claims that five parts of the tape contain exculpatory material:

a. The tape shows that Beanie knew where the murder occurred.

Beanie brought Det. Miller and Sgt. Eaton to the location on Schwegmann's parking lot where Beanie claimed Curtis Kyles' automobile was located when he and Kyles retrieved the automobile. Beanie pointed out that was the "same side where the woman was killed at." J.A. 231. He told police that he followed news accounts of the murder, which contained photographic information showing where the shooting occurred.[36] Petitioner argues that Beanie's knowledge of where the murder occurred indicated information which only the perpetrator would know. This conclusion is incorrect.

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[33] Testimony of Det. John Miller, H 2-24-89, p. 26; testimony of Sgt. James Eaton, H 3-3-89, pps. 58-59.

[34] H 3-1-89, pps. 5-6, testimony of assistant district attorney Jim Williams; H 2-20-89, pps. 103-108, 110, testimony of assistant district attorney Cliff Strider.

[35] H 2-24-89, pps. 58-59, testimony of Det. John Dillman.

[36] "I picked up on it when I seen the news and I seen it in the parking lot, and the car was right there." J.A. 229.

Photographs of the murder scene were in New Orleans newspapers and filled New Orleans television, and Beanie carefully followed both. J.A. 247. Prosecutor Cliff Strider concluded in postconviction testimony that everyone who lived in the area knew where the murder occurred.[37] This statement on the tape would have been of no value to Kyles at trial.

b. Beanie made a remark on the tape regarding Kyles's hairstyle.

On the tape Det. Miller asked Beanie about Kyles' hairstyle, which Beanie described as "bushy." J.A. 249. Det. Miller asked Beanie: "Does he ever wear it in plaits?," to which Beanie answered "Uh-huh." *Id.* That is, Beanie signified that Kyles did sometimes wear plaits, the hair style used by the perpetrator at the time of the murder, but Kyles had a bush on "that day," referring to the day after the Dye murder, when Kyles sold him the car. Kyles would have been unlikely to have kept the plaits after a parking lot full of people saw him murder Delores Dye. It is not surprising that the following day he was wearing a bush style hairdo, and the police properly

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[37] H 2-20-89, testimony of Cliff Strider, p. 130: " . . . it was on the T.V., it was on the radio, it was in the newspaper, and I think it was the talk of the town. I mean everybody knew where that occurred. I was in another trial and I knew." Even when the murder first occurred, Strider knew the precise location of the murder: "Near where the old pumps used to be." *Id.* Det. John Miller also emphasized that the case was "played up" on television and in the newspapers. H 2-24-89, p. 15.

attached no significance to the matter.[38] Indeed, if Beanie had been trying to frame Kyles he should have claimed that Kyles wore plaits.

c. Beanie requested on the tape to be reimbursed for the price he had paid for the automobile.

There was never any question that Beanie received money from the police. Det. Dillman acknowledged at the trial, in the presence of the jury, that Beanie was repaid the money ($400.00), he allegedly lost on the car.[39] Det. Miller checked the records during postconviction proceedings and determined that police had paid Beanie a total of $600.00, and this fact was reported to the court.[40]

d. Beanie suggested on the tape that Kyles might put incriminating evidence in his garbage.

Beanie suggested to Sgt. Eaton and Det. Miller that Kyles' garbage "goes out tomorrow" and said "if he's

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[38] Det. John Miller correctly noted in his postconviction testimony: "Well, if I committed a crime and I looked one way, I would do something to alter my appearance, to try and change my identity or the possibility of somebody identifying me." H 2-24-89, p. 50. Miller also testified that there is "nothing difficult at all" about changing a hair style from plaits to a bush. *Id.* It should also be noted that a police photograph taken on June 6, 1984 shows that Beanie was wearing a Jherri curl, not plaits, fifteen weeks before the murder. J.A. 53.

[39] Trial transcript, vol 2, p. 94.

[40] H 2-24-89, p. 20.

smart he'll put it in garbage." J.A. 257. On Sunday night Det. Dillman instructed officers Lambert and Saladino to pick up Kyles' garbage from the curb in front of his residence, which was done.[41]

Kyles now claims that an inter-office memorandum instructing that the garbage be picked up and the taped suggestion by Beanie constitutes favorable evidence for the defense because it shows that Beanie may have planted the victim's purse in Kyles's garbage. The State submits that this conclusion is speculative and the possibility of such was too remote to require that the police consider this to be exculpatory evidence. Anyone could physically have planted the evidence in Kyles's garbage, but there is no evidence that anyone other than residents at Kyles' house did so.

Sgt. Eaton did not consider Beanie's comment to be a suggestion that Beanie might plant evidence, and he did not tell Det. Dillman or prosecutor Strider about Beanie's comment.[42] In context, there was no reason for him to tell them.

e. The tape revealed that Beanie feared apprehension.

Beanie expressed anxiety to Sgt. Eaton and Det. Miller that he had been seen driving Mrs. Dye's automobile. J.A. 246-47. His anger that his acquaintance, Kyles, had exposed him to the danger of being arrested with Mrs.

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[41] R. vol. 2, trial transcript, pps. 63, 112.

[42] Testimony of Sgt. Eaton, H. 3-3-89, p. 65; testimony of Cliff Strider, H. 2-20-89, p. 112.

Dye's automobile may well have been Beanie's chief motivation for calling the police . However, such expressions in no way exculpate Kyles.

2. The Computer Printout Listing Automobiles in Schwegmann's Parking Lot.

At 9:15 p.m. on Thursday, September 20, 1984, about seven hours after Delores Dye was murdered, police surveyed license plates of the vehicles in the immediate area where the murder occurred. These plates were then run through the police computer and a printout made of the results. The printout was discovered in police files during postconviction proceedings, but was never in the district attorney's file.[43] Prosecutor Strider did not see the printout prior to trial.[44] Petitioner now contends the printout was exculpatory, because his vehicle was not listed on the printout.

Petitioner was not a suspect at the time the printout was prepared. Det. John Miller testified in the post-conviction proceedings that not all of the vehicles on the large parking lot at Schwegmann's were included in the survey.[45] The United States District Court and the Fifth

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[43] Testimony of Cliff Strider, H 2-20-89, at p. 136.

[44] *Id.*, p. 135.

[45] Miller was asked whether all of the vehicles were included in the canvass, and Miller replied "not all." Testimony of Det. John Miller, H 2-24-89, p. 11. Det. Miller testified that license numbers were from " . . . a very large parking lot, there were many cars, and. . . . detectives wrote down license numbers on vehicles *in the immediate area of the murder scene." Id.*, p. 12. Indeed, the lot covered five acres, according to the Louisi-

Circuit below concluded that the list was not complete.[46] Since the list included only cars in the immediate area of the murder scene, it could prove nothing if introduced at trial. The list was an investigative tool which produced no helpful information for the police, but was not exculpatory evidence.

3. Information Regarding the Murder of Patricia Leidenheimer.

Kyles claims police should have informed him of an investigation into the unsolved murder of Patricia Leidenheimer, a case in which Beanie admitted being present at Mrs. Leidenheimer's residence during an armed robbery preceding the murder.[47] Homicide Det. Ray Miller (not to be confused with Det. John Miller), the chief investigator in the Leidenheimer case, testified in Kyles's postconviction hearing that no one was charged with the Leidenheimer murder due to a lack of physical evidence.[48]

On November 28, 1984, immediately after Kyles first trial, two of Kyles's friends, Johnny Burnes (Kyles's brother-in-law, who later was convicted of murdering Beanie) and Ronald Gorman (a felon who testified for

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ana Court of Appeals decision in the civil case which arose from this murder. *Dye v. Schwegmann Brothers Giant Supermarkets*, 627 So.2d 688, at 690 (La. App. 4th Cir. 1993)

[46] J.A. 64, 149, 166.

[47] Petitioner's brief, pps. 16-17.

[48] H 3-3-89, testimony of Det. Ray Miller, p. 42.

Kyles at his first trial)[49] went to police and claimed that Beanie admitted killing Mrs. Leidenheimer. Det. Miller concluded that Johnny Burnes may himself have been implicated in the murder because of his knowledge of specific, unpublicized details of the murder.[50] Kyles argues that Beanie was not charged because he was supplying information to the police, but provides no proof of this.[51]

The Leidenheimer investigation cannot reasonably be considered *Brady* material. Even if the unproved assertions of Kyles were true and Beanie murdered Mrs. Leidenheimer, that information does not exculpate Kyles for the murder of Mrs. Dye. Beanie has not been convicted of the Leidenheimer murder, so even if his character had been at issue at Kyles's trial this information could not have been used against him. The Leidenheimer murder was an entirely separate affair from the Dye investigation. Det. Dillman, the chief investigating officer in the Dye case, was not even familiar with the Leidenheimer investigation.[52] This claim is simply without merit.

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[49] Judge Arceneaux referred to Gorman as "a convicted felon whose testimony was and continues to be suspect." J.A. 164.

[50] H 3-3-89, testimony of Det. Ray Miller, p. 43.

[51] Leidenheimer was a neighbor of the then Chief of Police, who took a personal interest in the case and repeatedly contacted the homicide detective assigned the case, Det. Ray Miller, for progress reports on the investigation. H 3-3-89, p. 46, 49. It is extremely unlikely that this murder would have remained unsolved simply to help Beanie.

[52] H 2-24-89, testimony of Det. Dillman, p. 64.

4. The Report of a Car Accident on Crozat Street.

Kyles claims that a report received by police during the Dye investigation concerning an automobile accident on Crozat street in New Orleans was exculpatory and should have been turned over to him.[53] The police report, which was placed into the record,[54] relates that a citizen told police he witnessed a "bright red Thunderbird" turn onto Crozat street and strike a parking meter on September 20, 1984, at 7:00 p.m. Kyles's inference is that this may have been Mrs. Dye's automobile operated by Beanie. However, the report indicates that the car involved in the accident had a black and white checkerboard patterned seat, whereas the photographs in evidence of Mrs. Dye's car clearly show that her car was a dull maroon red LTD with a solid maroon vinyl or leather interior. It could not have been the same car. This report, like other materials in police custody, could not have cleared Kyles of the murder charge.

5. Prosecutor Cliff Strider's Interview with Beanie.

After Kyles's first trial, prosecutor Cliff Strider summoned Beanie to his office, where he questioned him for the first time. Strider took notes of the interview. J.A. 258-262. Kyles now claims that inconsistencies between

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[53] Petitioner's brief, pps. 15-16.

[54] Defense exhibit 2.

what Beanie told Strider and what Beanie had previously told police constitute exculpatory evidence.[55]

Strider's testimony at the postconviction hearing shows that he was unaware of inconsistencies between Beanie's statements to him and Beanie's statements to the police on September 20, 1984.[56] These inconsistencies involve events surrounding Kyles's transfer of Mrs. Dye's car to Beanie, the transfer of groceries from Mrs. Dye's car, and Beanie's assistance to Kyles in retrieving Kyles's car from the Schwegmann's parking lot.

If the State had called Beanie to the witness stand and questioned him, these statements would have been discoverable because of their impeachment value to the defense. However, the State did not call Beanie, and impeachment was not an issue.

If Beanie had admitted to Strider that he was involved in the murder, this would have been exculpatory evidence favorable to Kyles. But Beanie made no such admissions, and Strider satisfied himself that Beanie was not the murderer. H 2-20-89, p. 113.

Under the circumstances, Strider's notes were not material exculpatory evidence which should have been turned over to the defense.

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[55] Petitioner's brief, p. 13.

[56] The hearing was held February 20, 1989.

6. Miscellaneous other complaints.

Kyles complains that the State did not provide him with Beanie's rap sheet,[57] without explaining how this would constitute exculpatory evidence.

He complains that prosecutor Strider persuaded the trial court to advise two defense witnesses, Johnny Burnes and Kevin Black, of their rights under the Fifth Amendment. The Louisiana Supreme Court rejected this argument, *State v. Kyles*, 513 So.2d at 271, and the federal district court agreed that the prosecutor had a legitimate basis for considering prosecution of these witnesses under the accessory statute, La. R.S. 14:25 or the obstruction of justice statute, La. R.S. 14:130.1. J.A. 178-179.

IV. THE COURT OF APPEALS CORRECTLY APPLIED THE LAW.

In *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court clarified the legal standard for determining whether the government's failure to disclose evidence warrants reversal of a conviction. The Court rejected any distinction between impeachment evidence and exculpatory evidence for purposes of the *Brady* rule, and then reformulated the standard of materiality applicable to non-disclosed evidence.

The Court held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 105 S.Ct. 3385 (opinion

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[57] Petitioner's brief, p. 16.

of Blackman, J.); *See* also *Id.* (opinion of White J., concurring in part and concurring in judgment). Justice Blackman's opinion further defined "a reasonable probability as a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)).

The State submits that the Court of Appeals correctly applied the rules set by this Court in *Bagley* to the facts of this case. Petitioner Kyles did not prove his allegations that the police withheld material exculpatory evidence, in violation of *Bagley*, or that prosecutors were guilty of misconduct.

Petitioner's complaints regarding the Court of Appeals' application of *Bagley* to the facts of this case may be considered as follows:

1. "The majority below failed to consider the impact that residual doubt has in this case. This was error." Pet. brief, p. 45.

Kyles argued in the Court of Appeals that *Bagley's* analysis cannot be used in capital cases. J.A. 51. However, that court rejected the argument for a stricter scrutiny standard (J.A. 52), and petitioner has not pursued it in his brief here. He complains only that the Court of Appeals failed to consider the effect of residual doubt, referring to that "uncertainty, though not rising to the level of reasonable doubt regarding guilt, [which] might have led . . . a juror to hold out for a life sentence." *State v. Lee*, 524 So.2d 1176, at 1192 (La. 1987).

The difficulty with considering the effect of withheld evidence on residual doubt, if any, in the penalty phase of a capital trial is that there is no measurable index by which to assess residual doubt. After the reasonable doubt standard has been satisfied the only doubt left, presumably, is some kind of psychological doubt which does not lend itself to rational analysis. By definition, the doubt is unreasonable. In Kyles's case, all of the withheld evidence pertained to the question of guilt, not to the penalty he might receive.

This Court held, in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), that a residual doubt instruction is not constitutionally mandated, while recognizing that residual doubts will inure to the defendant's benefit. *Id.* at 173. The Louisiana Supreme Court has affirmed the denial of a lingering or residual doubt jury instruction in Louisiana, stating "This standard of proof has no statutory or jurisprudential basis." *State v. Percy Davis*, ___ So.2d ___, No. 92-KA-1623, 1994 WL 201131 (La.) (La. 1994)

There was really not much the Court of Appeals could have considered beyond its holding that *Bagley* standards do apply to capital cases.

2. "The majority fails to consider the cumulative effect of the withheld information; the court views each suppressed item as separate and apart from each other. This is wrong as a matter of law." Pet. brief, p. 46-47.

There is no reason to assume that the Court of Appeals majority did not consider the cumulative effect

of the withheld information when it concluded, "We are not persuaded that either errors by counsel or prosecutorial misconduct hamstrung Kyles' defense." J.A. 74.

The Fifth Circuit has recognized cumulative error analysis in a habeas case. *Derden v. McNeel*, 938 F.2d 605, 609 (5th Cir. 1991). The circuit has instructed:

> "The sole dilemma for the reviewing court is whether the trial taken as a whole is fundamentally unfair. When a trial is fundamentally unfair, "there is a reasonable probability the verdict might have been different had the trial been properly conducted."
>
> *Id.* (citations omitted)

While the State denies that there were errors to accumulate in Kyles's case, it is evident from the majority opinion that the court considered the evidence as a whole in reaching its decision. This point was made succinctly by Judge Arceneaux below:

> "First, this court has found that none of petitioner's claims has merit; therefore, there is not error to accumulate. 'Zero times twenty is still zero.' *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987)"
>
> J.A. 180

3. **"The majority's assessment that the evidence against Kyles was overwhelming is erroneous, in part because the court fails to make this assessment in light of the defense evidence. It is plainly wrong in 'attach[ing] little significance' to the fact that the jury could not agree on a verdict at the first trial." Pet. brief, p. 47.**

The State submits that the majority did make its assessment in light of the defense evidence. The major part of the opinion written by the majority is spent assessing the defense evidence. The court just did not find the defense evidence persuasive: "Whatever the proof offered in the trial, this transcript contains overwhelming evidence of guilt." J.A. 68, n. 16.

While the Court of Appeals majority attached little significance to the fact that the jury could not agree on a verdict at the first trial, the State suggests that the most apparent difference between the evidence presented in the two trials was that in the second trial the State called Beanie into the courtroom in rebuttal and had the jury and the eyewitnesses view Beanie and Kyles together. The eyewitnesses then testified as to their reactions to seeing Beanie. That may have made the difference.

4. **"In assessing the materiality of the suppressed evidence, the Fifth Circuit majority also fails to take account of other egregious prosecutorial misconduct."** Pet. brief, p. 48.

The "egregious prosecutorial misconduct" to which Kyles refers in this argument is the action of prosecutor Strider in requesting the trial court to advise defense

witnesses Burnes and Black of their rights under the Fifth Amendment.

The State cannot respond to this argument more eloquently or thoroughly than Judge Arceneaux did in his Order and Reasons issued in the United States District Court below:

> This court rejects this argument as did the Louisiana Supreme Court in *Kyles*, 513 So.2d at 271. As stated before, Johnny Burnes' testimony is simply not credible under any circumstances, without any reference to his demeanor. Kevin Black testified that he saw Beanie in the Dye car between 3:15 and 3:30 p.m. on the day of the murder and that Beanie had his hair fixed in braids or plaits at the time. (Trial Testimony at 208-09). In relation to all of the other evidence and testimony adduced, these witnesses' demeanor would not have caused the outcome of this trial to be suspect. In addition the Louisiana Supreme Court found that if Beannie had provided the prosecutor 'information . . . indicating that Burns and Black facilitated defendant's attempts to avoid apprehension and destroy evidence, the prosecutor had a legitimate basis for considering prosecution under the accessory statute, La. R.S. 14:25 or the obstruction of justice statute, La. R.S. 14:130.1.' *Kyles*, 513 So.2d at 272 n. 6.

At the post-conviction hearing, Prosecutor Strider outlined the state's theory of the case as follows:

> Because what happened was that Curtis Kyles shot that lady, he took her car to . . . Kevin Black's apartment, and there is a place where you can park an automobile

> that you can't see it – behind Mr. Black's apartment, you can't see it unless you're standing right there. He then got, I believe Mr. Black, to drive him over to his house. They goofed off and there for a little bit. Then they got Johnny Burnes to take Black, Burnes, Kyles and Beanie back to the parking lot where the car was, and Burnes went in and picked up the car, Kyles' car. And Black and Kyles and Beanie waited . . . in the other parking lot while Johnny went over and picked up the car and drove it to Black's apartment complex, where they swapped the groceries from one car to the other car.

(Post-Conviction Hearings, Strider's Testimony, February 20, 1989, at 128-129). There was reason for Strider to ask for the court's intervention. This court cannot find constitutional error in the actions of the trial court."

J.A. 178-179

Kyles's trial counsel was not ineffective.

The record evidence shows that Kyles's trial counsel was not ineffective within the meaning of *Strickland v. Washington*, 104 S.Ct. 2052 (1984). Kyles did not argue counsel ineffectiveness in his brief to this Court, although the issue was authorized for consideration, nor did he cite *Strickland* in the context of counsel ineffectiveness. The State will therefore submit the matter.

CONCLUSION

For the above reasons, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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